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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1246

JOHN L. CONNOLLY, *et al.*,
Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

and

PENSION BENEFIT GUARANTY CORPORATION,
Respondents.

On Motion For Leave To File Petition For Writ Of Mandamus and Petition For Writ Of Mandamus

BRIEF FOR THE PENSION BENEFIT GUARANTY CORPORATION IN OPPOSITION

HENRY ROSE
General Counsel

MITCHELL L. STRICKLER
Deputy General Counsel

JAMES N. DULCAN
Assistant General Counsel

KAREN H. CLARK
Attorney

PENSION BENEFIT GUARANTY CORPORATION
Office of the General Counsel
2020 K Street, N.W.
Washington, D.C. 20006
(202) 254-3010

Of Counsel:

NATHAN LEWIN
MILLER, CASSIDY, LARROCA & LEWIN
2555 M Street, N.W.
Washington, D.C. 20037
(202) 293-6400

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BRIEF FOR THE PENSION BENEFIT GUARANTY CORPORATION IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals dated January 14, 1980, denying the petition for writ of mandamus (Pet.

App. E,[1] p. 29e) is not reported. The order of the district court dated September 13, 1979, denying the application to convene a three-judge court (Pet. App. D, pp. 26d-28d) is not reported. The decision of the district court entered on February 12, 1976, granting summary judgment to the petitioners (Pet. App. C, pp.14c-25c) is reported at 419 F.Supp. 737. The decision of the court of appeals dated May 9, 1978, reversing the entry of summary judgment (Pet. App. A, pp. 1a-12a), is reported at 581 F.2d 729. This Court's denial of the petition for a writ of certiorari to review that decision is reported at 440 U.S. 935.

JURISDICTION

The court of appeals' order denying the petition for writ of mandamus was entered on January 14, 1980. The Motion for Leave to File Petition for Writ of Mandamus and Petition for Writ of Mandamus were filed on February 12, 1980. This Court's jurisdiction is invoked under 28 U.S.C. § 1651.

QUESTIONS PRESENTED

1. Whether a single district judge's decision not to convene a three-judge court under 28 U.S.C. § 2282 (which was repealed in 1976) on the ground that a constitutional challenge to a federal statute is insubstantial is reviewable in this Court by writ of mandamus.

2. Whether a substantial constitutional issue is presented by the claim that Title IV of the Employment Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1301-1381, violates the Due Process and Impairment of Contract Clauses in that it may require

[1] The Motion for Leave to File Petition for Writ of Mandamus and Petition for Writ of Mandamus are designated "Pet." in this brief, and the Appendices thereto are designated "Pet. App."

contributing employers to expend more money for pension plans covered by the Act upon their termination than would have to be paid under the terms of the employers' collective-bargaining agreements.

STATEMENT

Petitioners are the trustees of the Operating Engineers Pension Trust, a joint labor-management trust created pursuant to the Labor Management Relations Act of 1947, as later amended. The Trust's principal offices are located in Los Angeles, California. The Trust administers a multiemployer pension plan for the benefit of members of Local No. 12 of the International Union of Operating Engineers and various associations of employers who are in the construction industry in Southern California and Southern Nevada. The pension plan is covered by the Employee Retirement Income Security Act of 1974 ("ERISA"), which was enacted, in part, to provide assurance that upon the termination of private pension plans, certain pension benefits will be paid. See 29 U.S.C. § 1001(a).

Title IV of ERISA, 29 U.S.C. §§ 1301-1381, establishes a program of plan termination insurance under which premiums are to be paid by covered pension plans to insurance funds which are administered by the Pension Benefit Guaranty Corporation ("PBGC"), a government corporation established by Section 4002(a) of ERISA, 29 U.S.C. § 1302(a). In addition, the Act authorizes the PBGC to oversee the termination of any pension plans and, in case the assets held by a plan upon termination are insufficient to pay guaranteed benefits to its beneficiaries, to recover the difference from the employer up to the specified statutory maximum of 30 percent of the employer's net worth. 29 U.S.C. §§ 1341-1368.

By its terms, Title IV of ERISA is inapplicable to "individual account plans" as defined in the Act. 29 U.S.C. § 1321(b)(1). An "individual account plan" is a plan under which each separate beneficiary has an individual account to which any individual "income, expenses, gains and losses" are separately allocated.

In an effort to avoid regulation under Title IV, counsel for petitioner addressed a letter to the PBGC on April 10, 1975, seeking a determination that the Trust's pension plan was an "individual account plan" and therefore excluded from coverage (Pet. App., pp. 43f-61f). General Counsel for the PBGC replied on May 21, 1975, that, in the agency's view, the Trust's plan was not an "individual account plan" but was, rather, a "defined benefit plan" which came within Title IV (Pet. App. pp. 62f-65f). This conclusion was based upon the method utilized to determine the monthly benefits a retiree receives under the terms of the plan.

Petitioners thereafter filed a complaint in the United States District Court for the Central District of California alleging that the PBGC "unlawfully and arbitrarily" refused to declare that the plan was exempt from Title IV and "unlawfully and arbitrarily" assumed regulatory jurisdiction over it as a "defined benefit plan" (Pet. App., p. 37f). The complaint alleged that the petitioners had been harmed by the PBGC's exercise of jurisdiction to the extent of the insurance premium in the amount of $12,043 they were obligated to pay, and that the PBGC's assumption of regulatory authority "has impaired the [petitioners'] discretion and authority" to administer the plan and could subject the trust to an "unknown future cost of providing benefits" and to the "risk of liability" in an amount up to 30 percent of the employers' net worth (Pet. App. 37f-39f). A separate paragraph of the complaint alleged, *inter alia*, that the "additional risk and liability" occasioned by the

plan's coverage under Title IV would "directly contravene" pre-existing collective bargaining agreements, would "impair the valuable consensual contract rights of the Employers, the Union, the Trustees and the participants," and would thereby deprive these parties of property without due process of law and without just and adequate compensation (Pet. App. 40f-41f). Petitioner prayed for return of the premium, a declaratory judgment that their plan was not a "defined benefit plan," and a permanent injunction restraining any action inconsistent with the judgment of the court (Pet. App. 41f-42f).

Thereafter, petitioners moved for summary judgment on the issue of statutory construction, and the district court granted that relief, making a finding that the plan was an "individual account plan" (Pet. App. 14c-25c). The court of appeals reversed, holding that the petitioners' plan met neither of the two requirements for an "individual account plan" because (1) contributions are pooled in a general fund and (2) the amount of a retiree's benefit is computed by a service-related formula, and not by the contributions paid on an individual's behalf into his or her account (Pet. App. 1a-12a). The petitioners' application to this Court for a writ of certiorari was denied. 440 U.S. 935.

At the conclusion of its opinion, the court of appeals noted that it was not deciding any constitutional questions and was remanding the case to the district court for it to pass upon "any constitutional issues which the parties may wish to present on remand" (Pet. App. 12a). Petitioners thereafter requested the impanelment of a three-judge court to consider the constitutional claim.[2] On September 13, 1979, the district court entered an order declining to convene a three-judge court on the

[2] Since the complaint was filed before August 12, 1976, the effective date of the repeal of 28 U.S.C. §§ 2281, 2282, the repeal of the three-judge court provisions is inapplicable to this litigation.

ground that "there is no substantial constitutional question raised warranting the convening of a three-judge court" (Pet. App. 26d-28d). The district court did not, however, enter any final judgment in the case, and it now has before it a motion for summary judgment filed by the PBGC.

Petitioner sought a writ of mandamus from the court of appeals to direct that a three-judge court be convened. In an order entered on January 14, 1980, the court of appeals denied the requested relief (Pet. App. 29e).

ARGUMENT

1. Petitioners have taken the wrong course in seeking, by mandamus from the Court, to compel the district judge to convene a three-judge court. Although there may have been a time when a petition for writ of mandamus in this Court was considered the proper procedural means to review a district judge's refusal to convene a three-judge court (see, *e.g.*, *Ex parte Metropolitan Water Co.*, 220 U.S. 539 (1911); *Ex parte Collins*, 277 U.S. 565 (1928)), that day has long gone. This Court squarely held in *Gonzalez* v. *Automatic Employees Credit Union*, 419 U.S. 90, 100 (1974), that "[i]t is now well settled that refusal to request the convention of a three-judge court, dissolution of a three-judge court, and dismissal of a complaint by a single judge are orders reviewable in the court of appeals, not here." See also *Schackman* v. *Arnebergh*, 387 U.S. 427 (1967); Stern & Gressman, *Supreme Court Practice* 135-136 (5th ed. 1978). And in a footnote in *Gonzalez*, this Court explained that when, as was true here, a district court refuses to convene a three-judge court, review in the court of appeals may be secured "either through petition for writ of mandamus or through a certified interlocutory appeal under 28 U.S.C. § 1292(b)." 419 U.S. at 100, n.19. Obviously, the decision of the court of appeals on an application

made to it for a writ of mandamus may be reviewed on certiorari in this Court. *E.g.*, *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500 (1959); *Will* v. *United States*, 389 U.S. 90 (1967). Thus, the proper procedure for petitioners to have utilized would have been to have filed a petition for a writ of certiorari to review the court of appeals' order of January 14, 1980, denying their request for mandamus.

2. Even if the pleading filed by petitioners in this Court is treated as a petition for a writ of certiorari, that writ should be denied for several reasons:

(a) The district court's conclusion that no substantial constitutional question was presented by the petitioners' complaint is plainly correct. Substantially the same constitutional challenge as is made here was considered and rejected by the Court of Appeals for the Seventh Circuit in *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 592 F.2d 947, 958-963 (7th Cir. 1979),[3] and this Court excluded that constitutional issue from its grant of certiorari in *Nachman*. 99 S.Ct. 2881 (1979). As the Seventh Circuit observed in *Nachman* and as we noted in our Brief in Opposition in that case, there are many significant differences between Title IV of ERISA and the Minnesota Private Pension Benefits Protection Act which this Court declared unconstitutional in *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234 (1978). See Brief in Opposition for Pension Benefit Guaranty Corp., No. 78-1557, pp. 9-11. Title IV of ERISA deals with "a broad, generalized economic or social problem" (438 U.S. at 250) of the kind involved in prior decisions of this Court which upheld important remedial leg-

[3] The *amicus* brief filed by various other California Trust Funds in this case characterizes the *Nachman* case as "the case most directly in point on the constitutional issue . . . ." *Brief Amici Curiae*, p. 24. There is no suggestion in that brief or in petitioners' that there is any conflict of decisions among federal courts over the constitutionality of Title IV of ERISA.

islation altering financial expectations. *E.g.*, *Home Bldg. & Loan Ass'n.* v. *Blaisdell*, 290 U.S. 398 (1934). This may be contrasted with Minnesota's law, which had "an extremely narrow focus." 438 U.S. at 248. In addition, Title IV of ERISA protects only employees whose rights to a pension have already vested. Thus, unlike the Minnesota statute, it safeguards justified "employee reliance interests." Compare 438 U.S. at 246, n.18. And finally, as the Seventh Circuit noted, Title IV of ERISA reflects a "Congressional attempt to moderate the impact of the liability imposed" and it creates a possibility of employer liability "only to the extent necessary to achieve the legislative purpose." 592 F.2d at 962. These characteristics of restraint and rationality distinguish this statutory scheme from any which the Court has found unacceptable under the Due Process or Impairment-of-Contract Clauses.

(b) Even if there were arguable merit to the petitioners' constitutional claim, the district court was correct in rejecting the request for a three-judge panel on other grounds. *First*, petitioners did not request in their complaint that Title IV of ERISA be enjoined across the nation on constitutional grounds. The declaratory and injunctive relief they requested when they instituted the action was limited to petitioners' particular circumstances and to the harm which they individually anticipated.[4] Thus neither the claim nor the requested relief brings this litigation within the reach of the former 28 U.S.C. § 2282, which was "enacted to prevent a single federal judge from being able to paralyze totally the operation of an entire regulatory scheme . . . by issuance

[4] Even the *amici* limit their arguments to the impact of Title IV on employees in the "building and construction industry." See *Brief Amici Curiae*, p. 4. A three-judge court would not be required under the repealed jurisdictional statute if the constitutional issue were whether the constitutional rights of employers *in this limited category* were violated by Title IV.

of a broad injunctive order." *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 154 (1963).[5] Prior to the repeal of 28 U.S.C. §§ 2281 and 2282, it was well established that a three-judge court was not required if the plaintiffs were seeking to enjoin only the application of a state or federal statute to their own unique circumstances, particularly if they did not request an injunction against the operation of the law. *E.g.*, *Flemming* v. *Nestor*, 363 U.S. 603, 607 (1960); *Butler* v. *Dexter*, 425 U.S. 262 (1976); cf. *Flast* v. *Cohen*, 392 U.S. 83, 89 (1968).

Second, the petitioners' constitutional claims appear to be premature. Unlike the plaintiff in *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 592 F.2d 947 (7th Cir. 1979), pending in this Court on certiorari, No. 78-1557, the petitioners have not terminated their pension plan or been subject to any liabilities other than the payment of the insurance premium. The concern over potential regulation by the PBGC is a claim of "injury in the abstract" rather than the "concrete injury" which must be alleged to justify judicial resolution of a constitutional issue. *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 217, 222 (1974); see also *Warth* v. *Seldin*, 422 U.S. 490, 498-502 (1975). The prematurity of the claim is demonstrated by petitioners' allegation that if Title IV becomes effective on May 1, 1980, collective bargaining negotiations "scheduled to be held in mid-1980" will be disrupted (Pet., p. 7). In fact, no present harm has been alleged; there is no means of knowing how the parties engaged in collective bargaining will deal with the law if it is then in effect; and there is not even any real certainty when and in what form Title

[5] Petitioners belatedly suggested to the district court, upon filing a motion to reconsider the denial of a three-judge court, that they would be willing to amend their complaint in any way necessary to establish the jurisdiction of such a tribunal. This was an inadequate and belated effort to rescue a claim that did not merit the convening of a three-judge court, and it should not affect the outcome of this case.

IV will be applicable. Congress has delayed mandatory application of Title IV on three occasions [6] and the PBGC has proposed legislation—presently being considered by Congress [7]—which would substantially modify the termination insurance program with respect to multiemployer plans so as to correct problems envisaged by the agency.

Third, petitioners do not appear to be the proper party to assert any constitutional impairment-of-contract claim. The collective bargaining agreements are, of course, concluded between *employers* and the unions representing their employees. If Title IV of ERISA unconstitutionally impairs the employers' contracts or deprives the employers of their property without due process of law, it is the employers who must assert that constitutional claim. The only plaintiffs in this case are the trustees of the pension plan which is allegedly affected by the statute. According to the plan's terms, half of the trustees have been selected by the employers and half by the union. This group cannot assert the employers' rights in court. Since the plaintiffs did not have standing to assert the constitutional claim being made, no three-judge court is required. *Gonzalez* v. *Automatic Employees Credit Union*, 419 U.S. 90, 100 (1974); *Smart* v. *Texas Power & Light Co.*, 421 U.S. 958 (1975).

(c) Finally, this case does not warrant review by this Court because, at this juncture, the constitutional question has not been finally resolved. The district court did not dismiss the complaint, and the constitutional issue remains before the single district judge. His decision, which may be made on the PBGC's pending motion for

[6] The original law delayed its effect until January 1, 1978. Two subsequent statutes have delayed it even further. See Pub. L. No. 95-214; Pub. L. No. 96-24.

[7] See S. 1076, 96th Cong., 1st Sess.; H.R. 3904, 96th Cong., 1st Sess. The text of the bill appears at 125 *Cong. Rec.* 66309 (daily ed. May 3, 1979).

summary judgment, will be subject to review in the court of appeals and ultimately, if necessary, in this Court.

Thus the only question presented by the instant petition is whether a three-judge court should have been impaneled. That question, which turns on the application of 28 U.S.C. § 2282—a statute repealed by Congress three-and-one-half years ago—is of no continuing importance and does not deserve the time and attention of this Court.

CONCLUSION

For the foregoing reasons, the Motion for Leave to File Petition for a Writ of Mandamus should be denied. If the petitioners' papers are treated as a petition for a writ of certiorari, certiorari should be denied.

Respectfully submitted,

HENRY ROSE
General Counsel

MITCHELL L. STRICKLER
Deputy General Counsel

JAMES N. DULCAN
Assistant General Counsel

KAREN H. CLARK
Attorney

PENSION BENEFIT GUARANTY CORPORATION
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NATHAN LEWIN
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